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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91218632
Party	Defendant MERCK KGAA
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Submission	Motion to Dismiss - Rule 12(b)
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Date	10/07/2014
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of the Trademark Application for SMARTFLARE, Ser. No. 85/868160

Clontech Laboratories, Inc.,

Opposer,

V.

Merck KGaA,

Applicant.

Opp. No.: 85/868160

MOTION TO DISMISS UNDER 12(b)6

Merck KGaA ("Applicant"), by and through its undersigned counsel, hereby requests that the Trademark Trial and Appeal Board (the "Board") dismiss the Notice of Opposition based on Opposer's alleged rights in and to the marks SMART-SEQ, as reflected in Ser. No. 85/951310, SMARTER-SEQ, as reflected in Ser. No. 85/951313, SMARTSEQ, Ser. No. 86035119, and SMARTERSEQ, Ser. No. 86/035125 (collectively, the "Pending Applications") set forth in the captioned Notice of Opposition ("Opposition") filed by Opposer Clontech Laboratories, Inc. ("Opposer"), based on Opposer's failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The Board must dismiss a notice of opposition under Rule 12(b)(6) if it fails to state a claim that is "plausible on its face." T.B.M.P. § 503.02, citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Advanced Cardiovascular Sys Inc. v. SciMed Life Sys. Inc.*, 26 U.S.P.Q.2d 1038, 1041 (Fed. Cir. 1993). The purpose of Fed. R. Civ. P. 12(b)(6) "is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity." *Advanced Cardiovascular Sys.*, 26U.S.P.Q.2d at 1041, citing *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989). When ruling on a motion to dismiss, the Board must accept the factual allegations pled in the complaint as true, but "[c]onclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim." *Bradley v. Chiron Corp.*, 45 U.S.P.Q.2d 1819, 1822 (Fed. Cir. 1998).

Opposer's Pending Applications are based on Intent to Use and were filed with the United States Patent and Trademark Office ("USPTO") either on June 5, 2013 or August 12, 2013. Opposer has not alleged in the Notice that any of the marks reflected in the Pending Application have been used in interstate commerce. Accordingly, since the applied for mark

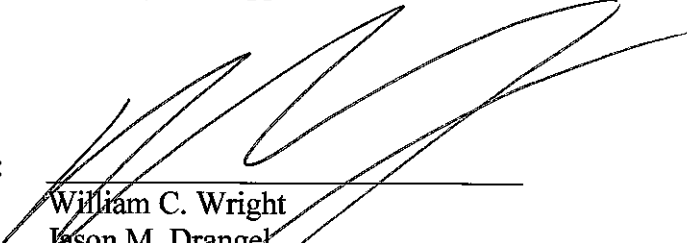
which is the subject of the Opposition, namely, SMARTFLARE, has an application filing date of March 6, 2013 and a priority filing date of September 7, 2012, Applicant has a prior constructive use date over all of the Pending Applications. Therefore, as a matter of law, Opposer may not rely on its Pending Applications in opposing the application to register the mark SMARTFLARE, Ser. No. 85868160, and any all claims relating to said Pending Applications must be dismissed.

Respectfully submitted,

EPSTEIN DRANGEL, LLP
Attorneys for Applicant

Dated: October 7, 2014

BY:



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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Motion to Dismiss under Rule 12(b)(6) was served by First Class Mail, with sufficient postage prepaid, on this 7th day of October, 2014, upon Opposer's attorney:

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BY: 

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